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NO. 85-1717

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1985

RICHARD WRODA,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS FIRST JUDICIAL DISTRICT

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QUESTION PRESENTED FOR REVIEW

Whether the constitutional issue of the right confrontation is presented by the actions of the trial dge who convicted petitioner of armed violence after easuring the length of the blade of the knife admitted to evidence in chambers, where the Appellate Court of inois affirmed the conviction based upon state law ich provides that a conviction for armed violence is oper without evidence of blade length if the evidence ows that the use of the knife rendered it a dangerous apon.

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED FOR REVIEW.....	i
TABLE OF CONTENTS.....	ii
TABLE OF AUTHORITIES.....	iii
OPINION BELOW.....	1
JURISDICTION.....	2
CONSTITUTIONAL PROVISION INVOLVED....	2
STATEMENT OF THE CASE.....	2
REASON FOR DENYING THE WRIT:.....	7
Since The Decision Of The Appellate Court Of Illinois Is Based On An Interpretation Of The Illinois Statute On Armed Violence And On The Ground That Any Variance Between Indictment And Proof Was Not Fatal, No Constitutional Issue Is Presented For Review.....	7
CONCLUSION.....	17

TABLE OF AUTHORITIES

CASES:

People v. Clark, 96 Ill. App. 3d 491, 421 N.E.2d 590 (3rd Dist. 1981)..... 12

People v. Ritter, 89 Ill. App. 3d 113, 411 N.E.2d 560 (3rd Dist. 1980)..... 12

People v. Zuniga, 99 Ill. App. 3d 396, 425 N.E.2d 1094 (1st Dist. 1981)..... 12

United States v. Warden, 545 F.2d 32 (7th Cir. 1976)..... 12

United States ex rel. Harris v. State of Illinois, 457 F.2d 191 (7th Cir. 1972), cert. denied, 409 U.S. 860 (1972)..... 12

People v. Hall, 117 Ill. App. 3d 788, 453 N.E.2d 1327 (1st Dist. 1983), cert. denied, 104 S.Ct. 2683..... 13

People v. Jones, 128 Ill. App. 3d 842, 471 N.E.2d 590 (1st Dist. 1984)..... 13

Garner v. Louisiana, 368 U.S. 157 (1961) (distinguished)..... 14, 15

CONSTITUTIONAL PROVISION:

U.S. CONST., AMEND. VI..... 2

STATUTES:

Ill. Rev. Stat. 1983, ch. 38, secs. 33A-1, 33A-2..... 8, 9

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OPINION BELOW

The petitoner was found guilty of armed violence by Judge Cornelius J. Houtsma, Jr. of the Circuit Court of Cook County, Illinois. The Appellate Court of Illinois affirmed the conviction. (No. 85-588, August 2, 1985) See Petitioner's Appendix A. Petitioner's petition for rehearing was denied. See Petitioner's Appendix B. Petitioner's petition for leave to appeal to the Supreme Court of Illinois was denied on February 5, 1986. See Petitioner's Appendix C.

JURISDICTION

Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. sec. 1257. However, as treated more fully below, respondent submits that no good reason exists for this Court to grant the instant petition for writ of certiorari.

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const. amendment VI provides, in pertinent part, that:

In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him.

STATEMENT OF THE CASE

Richard Wroda, Petitioner, was charged by the Grand Jury of the Circuit Court of Cook County, Illinois, with the offenses of attempt murder, aggravated battery (two counts), and armed violence (two counts) in Indictment No. 83-5857. On April 5, 1984, trial commenced in the Circuit Court of Cook County, Illinois,

re the Honorable Cornelius J. Houtsma, Jr. after tioner waived his right to a jury trial. At trial the owing evidence was adduced, in summary.

Rodger Goranson, the victim, testified that on June 983, at about 1:00 a.m. he and his wife went for a on a motorcycle. Later, while Goranson was driving n expressway, a car, a white Honda, pushed him off road. The Honda forced Goranson off the road again n he was on an exit ramp. Goranson then followed the da to a location near an intersection in Matteson, ois. There the Honda stopped, and Goranson stopped motorcycle. Petitioner Wroda, the driver of the da, got out. Goranson came up to him, shoved him, asked him what was the matter with him. Wroda then hed Goranson, but Goranson said he felt more pain would be normal for a punch. Goranson spun around started to go away when Wroda stabbed him in the . Goranson moved back to his motorcycle, and Wroda ted to kick the motorcycle and to threaten Goranson Goranson's wife. Goranson saw that Wroda had a e. Goranson told his wife to run and told Wroda he t want anymore. Wroda got back into his car.

Goranson was hospitalized for 26 days. He suffered a perforated bowel caused by four stab wounds. At trial Goranson identified a buck knife as the knife he saw in Wroda's hand.

Paula Lach, the girlfriend of Petitioner Wroda, testified that she was in the car with Wroda. A motorcycle was behind them, and after an encounter on the highway Wroda came to a sudden stop on a street. Wroda got out of the car. He had a knife in his hand, and he held the knife behind his back. She looked away when Wroda and Goranson were locked together. When Wroda reentered the car he gave her the knife and told her to put it into her purse. He also told her that he had stabbed the man.

Detective Michael Halpin of the Matteson Police Department testified that he encountered Mrs. Goranson screaming for help and saying that her husband had just been stabbed. She pointed out the offender's car. Detective Halpin pursued the car, arrested Petitioner Wroda, and recovered the knife which Wroda had used. The knife was admitted into evidence without objection.

Petitioner Wroda testified on his own behalf. He described his encounter with a motorcycle on the expressway. He testified that he stopped his car and got out, and the man on the motorcycle got off his motorcycle. Wroda acknowledged that he had a knife, and he identified the knife that had been admitted into evidence as the one. Wroda testified that the man pushed him hard against the car and hit him in the face. Wroda ducked down and punched the man with the knife. The man said that he had had enough and so Wroda went to his car, gave the knife to his girlfriend, and drove off until stopped by the police. Wroda admitted that he had the knife behind his back when he got out of the car.

The trial judge found Wroda not guilty of attempt murder and not guilty of the charge of armed violence based on attempt murder. The judge found Wroda guilty of both counts of aggravated battery and guilty of the charge of armed violence based on aggravated battery. The judge noted that the knife was obviously in excess of three inches in length. On June 20, 1984, the judge sentenced Wroda to six years in the Illinois Department of Corrections on the armed violence conviction only.

Before sentencing defense counsel filed a motion for new trial in which he argued that there had been no proof that the knife used had a blade in excess of three inches, as alleged in the indictment. The trial judge stated that he measured the blade himself and added that the blade was four inches. The judge said "to me it's obvious."

On June 20, 1984, Wroda filed Notice of Appeal. On August 2, 1985, the Appellate Court of Illinois, First Judicial District, affirmed Wroda's conviction. On October 22, 1985, the same Appellate Court denied Wroda's Petition for Rehearing. The Supreme Court of Illinois denied Petitioner Wroda's Petition for Leave to Appeal. Petitioner Wroda now petitions this Honorable Court for a writ of certiorari.

REASONS FOR DENYING THE WRIT

SINCE THE DECISION OF THE APPELLATE COURT OF ILLINOIS IS BASED ON AN INTERPRETATION OF THE ILLINOIS STATUTE ON ARMED VIOLENCE AND ON THE GROUND THAT ANY VARIANCE BETWEEN INDICTMENT AND PROOF WAS NOT FATAL, NO CONSTITUTIONAL ISSUE IS PRESENTED FOR REVIEW.

Petitioner Richard Wroda petitions this Honorable Court for a writ of certiorari to the Appellate Court of Illinois and alleges that his Sixth Amendment right to confrontation was violated when the trial judge privately measured the length of the blade of the knife introduced into evidence and then found petitioner guilty on a charge of armed violence, which charge specified that the blade had to be at least three inches long. The People maintain that the petition should be denied because the Appellate Court of Illinois affirmed the Petitioner's conviction on separate state grounds, namely on the grounds of a non-fatal variance between indictment and proof. The Appellate Court held that even though it is improper for

trier of fact to conduct private experiments or estigations, a conviction for armed violence in Illinois s not require proof that the knife used had a three- h blade where the evidence showed that the knife was dangerous weapon. Since the Appellate Court found ple proof in the record that the knife which petitioner lded was transformed by his use of it into a dangerous pon, the Court decided that any variance between the ictment and proof was not fatal. Thus, the Appellate urt of Illinois affirmed the petitioner's conviction on quate state grounds and decided no constitutional s. Therefore the petition should be denied.

The Illinois armed violence statute provides:

> A person commits armed violence when, while armed with a dangerous weapon, he commits any felony defined by Illinois Law. Ill. Rev. Stat. 1983, ch. 38, sec. 33A-2.

med with a dangerous weapon" is defined in Ill. Rev. t. 1983, ch. 38, sec. 33A-1 as follows:

> (a) **"Armed with a dangerous weapon."**
> A person is considered armed with a dangerous weapon for purposes of this Article,

when he carries on or about his person or is otherwise armed with a category I or category II weapon.

(b) A Category I weapon is a pistol, revolver, rifle, shotgun, spring gun, or any other firearm, sawed-off shotgun, a stun gun or taser as defined in paragraph (a) of Section 24-1 of this Code, knife with a blade of at least 3 inches in length, dagger, dirk, switchblade knife, stiletto, or any other deadly or dangerous weapon or instrument of like character.

(c) A category II weapon is a bludgeon, black-jack, slung-shot, sand-bag, sand club, metal knuckles, billy or other dangerous weapon of like character. (emphasis added)

Petitioner Wroda was charged with attempt murder, two counts of aggravated battery and two counts of armed violence. The trial judge found petitioner guilty of both counts of aggravated battery and of one count of armed violence, but he entered judgment and sentence only on the armed violence count, the most serious offense. That armed violence count read that on June 5th, 1983 at and within Cook County, Illinois, Richard L. Wroda committed the offense of armed violence "in that he, while armed with a dangerous weapon, to wit: a knife

with a blade over three inches in length, intentionally and knowingly without legal justification caused great bodily harm to Rodger Goranson by stabbing him on and about the body with said knife, in violation of chapter 38, section 33A-2/I/12-4-A of the Illinois Revised Statutes 1981 as amended."

At trial the evidence showed that petitioner Wroda stabbed the victim, Goranson, four times with a knife after Wroda's car and Goranson's motorcycle encountered each other on an expressway. Goranson was hospitalized for 26 days as a result of the stabbings. The knife which Wroda used was admitted into evidence without objection and Wroda himself acknowledged in his testimony that that was the knife he used. There was no testimony about the length of the blade, however.

In making his finding of guilty, the trial judge noted that the knife was obviously well in excess of three inches in length. Before sentencing, defense counsel filed a motion for new trial and argued that there had been no evidence presented that the blade was in excess of three inches. The judge responded that he had measured the blade and it was four inches. The judge said "to me it's obvious" and denied the motion for new trial.

On appeal Wroda argued that the People failed to introduce any evidence as to the length of the blade. The Appellate Court of Illinois agreed that it is improper for the trier of fact to conduct experiments or private investigations which have the effect of producing evidence which was not introduced at trial. However, the Court went on to hold that reversal was not required since there was ample evidence that petitioner committed a felony (aggravated battery) while armed with a dangerous weapon. The Court noted that even if there was no explicit showing that the knife used by defendant was per se dangerous because of its blade length, there was an explicit showing that it was transformed by defendant's usage into a dangerous weapon well within the meaning of the armed violence statute.

This conclusion was amply supported by the evidence which showed that petitioner Wroda stabbed the victim four times with the knife and as a result the victim was hospitalized for 26 days due to the four stab wounds, one of which penetrated the peritoneal lining of the victim's abdomen. The Court was clearly corrected in concluding that the knife Wroda used was a dangerous weapon.

The Appellate Court of Illinois went on to state that any variance between the indictment and the proof was not fatal. In reaching this conclusion the Court relied on Illinois law concerning variance. Illinois law has consistently provided that a variance between the charging instrument and the proof presented at trial is not fatal where the offense charged is sufficiently set forth to enable an accused to properly prepare a defense and raise the judgment as a plea in bar to a later prosecution for the same offense. People v. Clark, 96 Ill. App. 3d 491, 421 N.E.2d 590 (3rd Dist. 1981). People v. Ritter, 89 Ill. App. 3d 113, 411 N.E.2d 560 (3rd Dist. 1980). People v. Zuniga, 99 Ill. App. 3d 396, 425 N.E.2d 1094 (1st Dist. 1981). The same principle has been applied by federal courts. See United States v. Warden, 545 F.2d 32 (7th Cir. 1976). United States ex rel. Harris v. State of Illinois, 457 F.2d 191 (7th Cir. 1972), cert. denied, 409 U.S. 860 (1972).

In the instant case the offense was charged with sufficient specifity to have enabled petitioner, Wroda to properly prepare a defense. The armed violence count alleged that Wroda was armed with a dangerous weapon,

to wit: a knife. The armed violence count also specified what Wroda did with the knife: he stabbed Goranson with it. The language of the armed violence count that the knife had a blade in excess of three inches was properly treated as surplusage since armed violence, under Illinois law, requires the defendant simply to be armed with a dangerous weapon and the definition of dangerous weapon is not limited, in the case of knives, to knives with a blade in excess of three inches, but includes any other deadly or dangerous weapon or instrument of like character. Hence, the Appellate Court of Illinois was clearly correct in basing its decision on the separate state ground that any variance between indictment and proof in the instant case was not fatal.

The conclusion of the Appellate Court concerning variance is amply supported by Illinois law concerning the Illinois armed violence statute. In People v. Hall, 117 Ill. App. 3d 788, 453 N.E.2d 1327 (1st Dist. 1983) cert. denied, 104 S.Ct. 2683, the Appellate Court of Illinois upheld an armed violence conviction even though the charging instrument did not specify the blade-length of the knife. In People v. Jones, 128 Ill. App. 3d 842, 471 N.E.2d 590

1st Dist. 1984), one armed violence conviction was upheld even though the charging instrument specified that the knife had a blade of at least three inches but there was no proof of the blade-length. Thus, under Illincis law, where the charging instrument charges armed violence and charges that the defendant was armed with a dangerous weapon, namely a knife, and the proof at trial shows that defendant's use of the knife was such as to render it a dangerous weapon, the defendant can properly be convicted of armed violence whether or not the blade-length of the knife is alleged and proved.

It is clear that Petitioner Wroda's petition presents no constitutional issues. The Appellate Court opinion affirming Wroda's conviction dealt with the interpretation of an Illinois statute and with the application of the Illinois law of variance to the facts presented at Wroda's trial. It did not decide any constitutional issues. The petition for writ of certiorari should be denied.

Petitioner relies on Garner v. Louisiana, 368 U.S. 157 (1961). The facts of that case are not even remotely similar to the instant case. In Garner several black defendants were convicted of disturbing the peace for

efusing to move from a cafe counter seat in a racially egregated restaurant. This Court reversed the onvictions of the defendants and rejected the argument aised by the respondent on appeal that the trial court ould have taken judicial notice of the history of race elations in the area to conclude that the actions of the efendants could cause a disturbance. This Court pointed ut that the record did not show that the trial court took dicial notice of anything. In the instant case, in ontrast, the trial judge did say that he measured the ife blade and that to him it was obvious that it was over ree inches. A plausible argument can be made that a ourt can determine that an object is over three inches in ngth by simply examining it once it is admitted into idence. Such a determination is not analogous to an stated assumption about the history of race relations in given area as in Garner. However, whether or not the al judge could properly make such a determination of gth is not the issue in the instant case. The issue is ether a defendant can be convicted of armed violence ed on his use of a knife when the indictment charges used a knife with a blade in excess of three inches even

if there is no proof of this length. This issue is purely a question of state law and was correctly decided against Petitioner by the Appellate Court of Illinois. The Appellate Court of Illinois decided this issue on purely state grounds and did not reach any constitutional issues. Therefore, the petition for writ of certiorari should be denied.

CONCLUSION

For all the foregoing reasons, Respondent respectfully prays that this Honorable Court deny the instant Petition for Writ of Certiorari.

Respectfully submitted,

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